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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 774

WORLD AIRWAYS, INC.,
Petitioner,

v.

NORTHEAST AIRLINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

World Airways, Inc., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on August 30, 1965.

OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts entered March 12, 1965 (Appendix B, infra, p. 33), is reported at 237 F. Supp 383 (1964). The opinion of the Court of Appeals for the

First Circuit entered August 30, 1965 is reported at 349 F. 2d 1007 (1965). It is reprinted in Appendix B, infra, p. 21.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 30, 1965 (Appendix B, infra, p.). The jurisdiction of this Court is invoked under Section 28 U.S.C. 1254(1).

QUESTION PRESENTED

The lower court construed a certain agreement to be in violation of the carrier's certificate for supplemental air transportation. It found the construction of both the agreement and the certificate to be solely a "question of law" not requiring administrative expertise. However, the record showed the certificate provision in question was a subject of continuing revision and redefinition by the Civil Aeronautics Board, that the Board might have reached a different conclusion than the court, and that the question concerned regulation in a new, complex and unsettled field.

On the basis of the above facts, the question is whether under the doctrine of primary jurisdiction, the District Court had jurisdiction under 49 U.S.C.A. 1487(a) to enjoin flights to be operated under the agreement in question.

STATUTES INVOLVED

The following statutory provisions are set forth in Appendix A, infra, pp. 16-20, Sections 401(a); 401(d)(3); 416(b); 1007(a) of the Federal Aviation Act of 1958, and section 7 of Public Law 87-528, Act of July 10, 1962, 72 Stat. 143.

STATEMENT OF THE CASE

The case originated with the filing of a complaint on December 11, 1964 in the United States District Court for the District of Massachusetts by Respondent, Northeast Airlines, Inc., (Northeast). The complaint (R. 6) prayed, *inter alia*, for a preliminary injunction restraining Petitioner, World Airways, Inc. (World) from performing certain charter flights for groups solicited by Nationwide Charters and Conventions, Inc. (Nationwide), a travel agency, under a sales agency agreement with World. Northeast alleged that the proposed charters were not authorized by the terms of the interim certificate issued to World by the Civil Aeronautics Board (R. 9).

The sales agency agreement between World and Nationwide (R. 371) was entered into on August 13, 1964. Under its detailed provisions World agreed to guarantee the availability of its jet aircraft for charter flights between points in the Northeast and Florida or Hawaii on specified dates over a period from December 19, 1964 to May 5, 1965. (R. 387-8). Nationwide was to be paid a commission on charters sold utilizing the open dates alloted to it. Part of the consideration to World for making Nationwide its agent was an agreement by Nationwide to pay liquidated damages to World for any charter flights guaranteed by World which Nationwide was unable to sell to *bona fide* charter groups. (R. 376).

On December 24, 1964 the District Court granted a Motion of Northeast for a preliminary injunction generally in accord with that requested by Northeast. (R. 298). A memorandum of the Court on December 21, 1964 (R. 294) concluded that proposed charter trips were not "supplemental air transportation" but were "individually ticketed transportation beyond the scope of World's operating authority". (R. 295).

On January 26, 1965 Northeast filed a Motion for Summary Judgment based solely on the August 13, 1964

sales agency agreement between World and Nationwide and advertisements and brochures issued by Nationwide. (R. 306). This Motion was heard on March 2, 1965, and was allowed March 12, 1965. (Opinion, R. 424). On March 16, 1965 the District Court entered judgment for a permanent injunction substantially similar in its terms to the preliminary injunction. (Appendix B, infra, p. 40).

The District Court concluded, despite Petitioner's contrary assertion, that it had jurisdiction to issue the injunction by virtue of 49 U.S.C.A. 1487(a). The Court went on to find:

> ". . . that the flights scheduled between the defendant World Airways, Inc. and the defendant Nationwide Charters and Conventions, Inc. under the so-called 'Sales Agency Agreement' are in violation of 'Part I—Charter Service' as defined by Part V of its interim certificate and are illegal;" (Appendix B, infra, p. 37).

The Court of Appeals for the First Circuit affirmed the judgment insofar as it enjoined the operation of flights between Boston/New York/Washington/Philadelphia and Florida pursuant to the sales agency agreement. It remanded for further findings with respect to East Coast—Hawaii flights. (Appendix B, infra, p. 39).

The Court of Appeals also rejected the contention that the District Court lacked jurisdiction under 49 U.S.C. 1487(a). The doctrine of primary jurisdiction was held not applicable because the issue was "whether the contract between World and Nationwaide violates the certificate authority issued to World . . . The analysis, interpretation, construction, and application of contracts are within judicial competence and, at least in the case before us, require no administrative expertise for a solution." (Appendix B, infra, p. 27).

REASONS FOR GRANTING THE WRIT

Summary: The case poses an important question concerning the doctrine of primary jurisdiction. The Court of Appeals found the doctrine inapplicable because it found no administrative expertise necessary to construe the terms of an "interim certificate" and a contract alleged to be in violation of that certificate. However, the record showed that the terms construed were complex and ill-defined, were under active review by the agency, and were subject to frequent revision. Moreover, it was evident that the agency, because of greater familiarity with the subject matter, might not have construed the contract as did the Court.

The decision of the First Circuit conflicts in principal with the decision of the Ninth Circuit in Trans-Pacific Airlines, Ltd. v. Hawaiian Airlines Ltd., 174 F. 2d 63 (1949). Decisions of the Supreme Court on this aspect of primary jurisdiction have moved toward the view indicated by the Ninth Circuit. However, these decisions have tended to muddy the Court's holding in the leading Great Northern case, and the reach of the doctrine with respect to the interpretation of specialized terms requires clarification. See: Jaffe, Primary Jurisdiction, 77 Harv. L. Rev. 1037, 1043-1047. A determination by the Court of this issue would also avoid the possibility of vexatious litigation and unnecessary judicial intervention in a new area of regulation where the agency has not yet had time to formulate even its own views. As illustrated by this proceeding, the misapplication of 49 U.S.C.A. 1487(a) with respect to charter trips can lead to substantial public inconvenience and economic hardship.

1. The First Circuit found that the case presented solely a "question of law" which could be decided by construing World's certificate and the World-Nationwide contract. Such interpretation, it found, required "no administrative expertise for a solution". (Appendix B, infra, p. 27). In order to reach that conclusion, however, it was necessary for the Court to determine that the sales agency agreement was, in reality, a charter agreement. In so doing, the Court determined—without specialized knowledge of the unique factors affecting sales agency agreements for charter air transportation—that a provision for liquidated damages was sufficient to make the document a charter agreement, and that such agreement was prohibited by the terms of World's certificate which does not authorize charters by a person whose business includes "the solicitation or sale of transportation services" or services performed, "under an arrangement with a person . . . who provides or offers to provide transportation to the general public". (R. 259).

The Court's conclusion that it was competent to deal with the question was made although the record showed the following:

a. Early in 1964 a complaint was filed with the Civil Aeronautics Board alleging the Trans International Airlines (which was subject to the same certificate provisions) had exceeded its authority by virtue of an arrangement with Nationwide and one Lansburgh who had arranged for a program of charters to Florida in a manner substantially like the arrangement in issue between World and Nationwide.

The Director of the Bureau of Enforcement determined that Nationwide and Lansburgh were not charterers. (R. 123-125). The CAB subsequently affirmed the staff action (*"Shower of Stars"* case, R. 110-112).

b. In the *"Shower of Stars"* case, the Director's letter stated that the definition of "charter trip" is derived from, and substantially similar to, a prior regulation by the CAB governing domestic charter trips by scheduled carriers, but that as to the issues posed (including whether Nationwide and Lansburgh were charterers), "the complaints probe areas as to which the Board has set no clear standards or established specific limits". (R. 116)

c. The construction of interim certificates was a matter of active concern and continuing surveillance by the CAB and its staff at the time of the District Court petition:

(1) On December 11, 1964, the Bureau of Enforcement found it necessary to issue an advisory opinion covering a number of practices in connection with "charter trips" and stating its view as to which of such practices were consistent with the certificate definition. (R. 34-41)

(2) On December 17, 1964, just prior to the restraining order, attorneys for World sought further guidance from the Bureau of Enforcement as to flights contemplated under the Nationwide agreement (R. 412-414), and offered to cancel any flights the Bureau found were not in compliance. (R. 412). Corrective steps were taken by World as a result of this conference and World understood the flights it then proposed to operate "to be permissible". (R. 191).

(3) On December 23, 1964, the Board itself promulgated a modified definition of charter to prohibit mass media advertising—a matter about which Northeast had complained and about which the previous definition of charter was not clear. (R. 414).

d. Formal proceedings were taking place before the CAB in the *Supplemental Air Service Proceeding*[1] involving a complete re-examination and revision of the term "charter trips". (R. 181).

The clear indication in the record that the meaning of "charter trip" was then a matter of current concern to the agency, that similar arrangements had been sanctioned in the *"Shower of Stars"* case, and that the entire subject was in a state of upheaval at the agency, provided warning that the question of interpretation might not be within the competence of the Court.

Even absent such evidence, it is questionable whether the Court was at liberty to find that the agreement made Nationwide a charterer. A determination of the true significance of the liquidated damages provision required a specialized knowledge of the conditions peculiar to sale of jet charters: the competing demands for jet capacity, industry practice in charter agency relationship and the economic significance of "ferry" versus "live" mileage and idle equipment time. Only the agency was equipped to weigh these factors in determining whether the liquidated damages provision was a natural provision in the bargain for a charter sales agency or an indirect device for accomplishing an unlawful charter.

2. The decision of the First Circuit conflicts in principle with the decision of the Ninth Circuit in *Trans-Pacific Airlines Ltd.* v. *Hawaiian Airlines Ltd.*, 174 F. 2d 63 (1949). That case concerned the jurisdiction of a District Court under 49 U.S.C.A. 1487(a) to enjoin air transpor-

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[1] This proceeding, C.A.B. Docket 13795 *et al*, deals with all applications for certificates of public convenience and necessity for "supplemental air transportation" pursuant to section 401(d)(3) of the Federal Aviation Act, 49 U.S.C.A. 1371(d)(3). Issues include a substantial broadening of the term "charter trips" including, *inter alia*, the chartering to travel agents in connection with sale of all-expense tours.

tation alleged to be outside the scope of the defendant's operating authority. The defendant's authority was issued in the form of an exemption under section 416(b) of the Federal Aviation Act (49 U.S.C.A. 1386(b)) from the requirements of section 401(a). The Court held that, "as long as this exemption existed, Trans-Pacific was under the jurisdiction of the Board, and the district court had no power to interfere", 174 F. 2d at 66. Pertinent portions of the opinion are as follows:

> "The Board has adopted Economic Regulations which purport to give exemption to certain air carriers. If mere textual criticism were involved the problem would be a juridical one. But 'technical words and phrases not commonly understood are employed.' In the light of the statute an attempt to shoulder on the courts the explanation of phrases dealing with the usages of this new industry or the solution of the complex and unique factual problems incident to air transportation in its present period of development would be an effort to confer legislative power on the court." (Footnotes omitted) 174 F. 2d at 66.

> "Where the application of the administrative regulations is clear and no special familiarity with the complicated factual situations peculiar to the field is imposed, and no determination of direction is required, the courts will proceed. Great Northern Railway Company v. Merchants Elevator Company, 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943. On the other hand, prior to judicial intervention, problems which involve expert knowledge of multitudinous detail of intricate nature is a technical field required that recourse should be had to administrative bodies. Especially is this true where uniformity of interpretation of rules and consistency in application, in view of an overall poicy, is compelled by the legislative mandate." 174 F. 2d at 66.

> "The function of the Board did not end here with the promulgation of the Economic Regulations. Power

to terminate suspend or revoke the certificate of registration was reserved by the Board upon appropriate precedent finding, or hearing. Economic Regulations 292.1(d) (2), (d) (4) and (d) (5), 12 Fed. Reg. 3078. The process will not end until the Board by action in the particular case has allocated to it by a consideration of its economic situation a position in a striking pattern formed by inclusions and exclusions from grants of exemptions. Elements arising in the future may require amendments to the Economic Regulations and Trans-Pacific may be in an exceptional situation. The courts should not interfer with this formulative process, for the natural administrative lines might be distorted and the purpose of the Act in creating an administrative agency frustrated." 174 F. 2d at 66. (Footnote omitted)

The *Trans-Pacific* case was cited to the First Circuit. The lower court opinion attempts to distinguish it in the following manner:

"This is not a case like Trans-Pacific Airlines v. Hawaiian Airlines, 9 Cir., 174 F. 2d 63, where Hawaiian sought to enjoin Trans-Pacific from operating as a scheduled air carrier and it appeared that the Board had granted Trans-Pacific an exemption. The court held that as long as the exemption was effective Trans-Pacific was under the jurisdiction of the Board and the courts could not interfere. Here we have operation by World under a certificate rather than under an exemption." 349 F. 2d at 1012, Appendix B, infra, p. 28.

The purported distinction between an exemption and an interim certificate is without significance. An exemption is issued under section 416(b) of the Federal Aviation Act, and an interim certificate under section 7 of Public Law 87-528. But the critical attributes are the same. Like an exemption, the interim certificate is a temporary authority. It has effect only until the CAB acts upon applications for certificates of public conven-

ience and necessity under section 401(d)(3) of the Act.[2] (See: P.L. 87-528, sec. 7(a), Appendix A, infra, p. 19). Like an exemption, it is not a license within the contemplation of the Administrative Procedure Act.[3] Like an exemption, it is subject to revision by the Board without hearing.[4] The "charter trip" definition in World's certificate is, like Trans-Pacific's exemption, in the nature of a regulation. As noted by the CAB staff it was "derived from" and is "substantially similar to" the Board's long standing charter regulation. (R. 116)

The essential concern of the Ninth Circuit was the harm of judicial intervention in an area of administrative experimentation.[5] That same issue is presented in this case, and the facts here tend to emphasize the conflict on the point. The term which the lower court felt qualified to construe itself, "charter trips", was one deliberately left to be defined by the Board. Congress chose

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[2] Such applications, including that of World, are before the Board in the pending *Supplemental Air Service Proceeding*, Docket 13795 *et al.*

[3] Sec. 7 (d) of P.L. 87-528 states:

> "(d) A new interim certificate or new interim authority issued under this section shall not be deemed a license within the meaning of section 9 (b) of the Administrative Procedure Act (5 U.S.C. 1008(b))."

[4] E. g. C.A.B. Order E-21304, Sept. 21, 1964 (R. 242); Order E-21837, February 25, 1965, (R. 414).

[5] "The rules or economic regulations of the Board are not static. Common observation will suggest that the economic situation of an air carrier or class of air carriers will be mutable. It is for the Board to adjust these relations under the complicated formula of the statute. Experience in cases arising under the rules from exemptions will clarify the needs. The practices developed by the economic dynamics will guide the administrative body in the promulgation of regulations. Thus the day by day happenings will mold the statute under administrative guidance into an efficient instrument. . . In the nature of things the jurisdiction of the Board to make such determinations must be exclusive." 174 F.2d 63, 65 (1949)

only to define supplemental air transportation as "charter trips in air transportation . . . rendered pursuant to a certificate of public convenience and necessity issued pursuant to section 401(d)(3) of this Act . . ." (49 U.S.C. 1301(33)). The reason is reflected in the following excerpt from the House Committee Report:

> "Your committee, however, after considering the problem, came to the conclusion that under the circumstances, authority to define charter services should be left, as at present, with the Board, subject to the limitations contained in the reported bill. This is a very difficult subject and any effort to freeze a definition of charter service into law could well lead to complications." H.R. Report 1177, 87th Cong. 1st Sess., p. 11.

The D.C. Circuit recently concluded, in a case involving supplemental certificates for transatlantic service:

> *"We are unable to conclude that the term charter trips has a fixed meaning. . .* We conclude Congress intended, although not without limits, that the Board should be free to evolve a definition in relation to such variable factors as changing needs and changing aircraft. . ." (emphasis added) *American Airlines, Inc.* v. *Civil Aeronautics Board*, 348 F. 2d 349, 354 (1965).

In that case the Court went on to find that a charter trip could include a hiring of half an aircraft each by two persons. As noted above, other proceedings still before the Board involve proposed additional changes in the term and the possibility of a substantial further broadening of it. Given these circumstances and the other evidence that the subject matter was under active consideration by the CAB, it is clear that the Ninth Circuit would most certainly have reached a different conclusion than the First Circuit in this matter.

3. The Supreme Court has not yet reached the question involved here, and its decisions in the general area of in-

terpretation of specialized terms are not entirely harmonious. In *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922), the Court dealt with the question of under what circumstances construction of specialized terms required referral to the agency. It found referral not required where "the words of a written instrument are used only in the ordinary meaning", in which case "their construction presents solely a question of law", 259 U.S. at 291.[6] In *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59 (1956) the Court refused to sustain an interpretation of a tariff by the Court of Claims on the basis essentially of its "plain meaning". Rather, it was held that the Court would be engaging in "judicial guesswork" (352 U.S. at 69) if it attempted to construe the terms of the tariff without learning from the agency "the factors and purposes underlying the terminology", 352 U.S. at 67. Similarly see: *United States* v. *Chesapeake and Ohio Ry. Co.*, 352 U.S. 77 (1956), decided the same day.

The latter decisions have been criticized as an unwarranted departure from the *Great Northern* opinion. See, Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037, 1045-1046. The instant case permits opportunity for the Court to spell out its view in this important area of jurisdictional conflict.

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[6] But see: *Standard Oil Co. (Indiana)* v. *United States*, 283 U.S. 235, 238-9 (1931):

> "The case before the Commission did not, as contended, involve merely the construction of the written words employed in a rate tariff—a simple question of law; but required consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use."

The *Standard Oil* case was relied upon by the Court in the *Trans-Pacific* decision. It distinguished the *Great Northern* case. See excerpt, infra. p. 9.

4. Finally, it is important to the development of the new supplemental air transportation industry that its certificated carriers[7] not be subjected to vexatious litigation by means of 14 U.S.C.A. 1487(a) and that the public not be harmed thereby. The injunction issued by the District Court in this proceeding deprived World of $2,000,000 in civilian revenue (R. 180) and threatened the loss of $4,000,000 in military business (which requires $1 of civilian revenue for every $2 of military) (R. 181). The injunction stranded 1,000 persons in Miami and 180 in Hawaii (R. 199)[8] and it was estimated that an additional 10,000 people had made vacation plans on the basis of the enjoined flights (R. 180). The injunction also led ultimately to the financial collapse of Nationwide and the threatened loss of numerous individual trip deposits entrusted to Nationwide.[9]

As this illustrates, 49 U.S.C.A. 1487(a) can be a powerful and destructive weapon in the hands of a competing air carrier. The impact of this last-minute injunction may be expected to encourage other competitors of other supplemental air carriers to attempt to avail themselves of the same means. A decision by the Supreme Court on the question presented could serve to forstall a repetition of the hardship in the instant case and could serve in general to minimize the economic harm of abrupt judicial intervention in the early stages of development of this industry.

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[7] Eleven carriers who hold interim certificates for supplemental air transportation have been recommended by a C.A.B. Examiner for certificates under Section 401(d)(3) of the Act. Initial Decision, *Supplemental Air Service Proceeding*, Docket 13795, *et al.*

[8] A special C.A.B. Order was obtained to permit return of these persons. Order E-21631, December 30, 1964.

[9] Nationwide is now in Chapter XI proceedings in the U.S. District Court (Mass.), Civil Action No. 65-181.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Statutes Involved

I. Federal Aviation Act of 1958

§ 101 (49 U.S.C.A. 1301). Definitions

As used in this chapter, unless context otherwise requires—

(33) "Supplemental air transportation" means charter trips in air transportation, other than the transportation of mail by aircraft, rendered pursuant to a certificate of public convenience and necessity issued pursuant to section 401 (d) (3) of this Act to supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to sections 401 (d) (1) and (2) of this Act.

§ 401 (49 U.S.C.A. 1371). Certificate of public convenience and necessity—Essentiality

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

(d) (3) In the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate, to any applicant not holding a certificate under paragraph (1) or (2) of this subsection, authorizing the whole or any part thereof, and for such periods, as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform the transportation covered by the application and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder. Any certificate issued pursuant to this paragraph shall contain such limitations as the Board shall find necessary to assure

that the service rendered pursuant thereto will be limited to supplemental air transportation as defined in this Act.

§ 416 (49 U.S.C.A. 1386). Classification and exemption of carriers

(a) The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Board finds necessary in the public interest.

(b) (1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

(2) The Board shall not exempt any air carrier from any provision of subsection (k) of section 401 of this title, except that (A) any air carrier not engaged in scheduled air transportation, and (B), to the extent that the operations of such air carrier are conducted during daylight hours, any air carrier engaged in scheduled air transportation, may be exempted from the provisions of paragraphs (1) and (2) of such

subsection if the Board finds, after notice and hearing, that, by reason of the limited extent of, or unusual circumstances affecting, the operations of any such air carrier, the enforcement of such paragraphs is or would be such an undue burden on such air carrier as to obstruct its development and prevent it from beginning or continuing operations, and that the exemption of such air carrier from such paragraphs would not adversely affect the public interest: *Provided*, That nothing in this subsection shall be deemed to authorize the Board to exempt any air carrier from any requirement of this title, or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder which provides for maximum flying hours for pilots or copilots.

§ 1007 (49 U.S.C.A. 1487). Judicial enforcement; jurisdiction; application; costs

(a) If any person violates any provision of this Act, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Board or Administrator, as the case may be, their duly authorized agents, or in the case of a violation of section 401(a) of this Act, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this Act or of such rule, regulation, requirement, or-

der, term, condition, or limitation, and requiring their obedience thereto.

II. Public Law 87-528, Act of July 10, 1962, 76 Stat. 143

§ 7(a) If any applicant who makes application under section 401(d)(3) of the Federal Aviation Act of 1958 for a certificate for suppplemental air transportation within thirty days after the date of enactment of this Act shall show—

(1) that it, or its predecessor in interest, was an air carrier authorized to furnish service between places within the United States under a certificate of public convenience and necessity issued by the Civil Aeronautics Board pursuant to order E-13436, adopted January 28, 1959, or order E-14196, adopted July 8, 1959, or that it was given interim authority to operate in interstate air transportation as a supplemental air carrier under Board order E-9744 of November 15, 1955, and has pending before the Board an application for certification as a supplemental air carrier which was filed prior to July 14, 1960;

(2) that, during the period beginning on the date such certificate was issued or such interim operating authority was conferred by the Board and ending on the date of enactment of this Act, such applicant or his predecessor in interest lawfully performed (A) a substantial portion of the transportation authorized by such certificate or interim operating authority, (B) substantial operations in overseas or foreign air transportation, as a supplemental or large irregular air carrier, authorized by the Board, or (C) substantial operations for the Military Establishment of the United States authorized by the Board;

(3) that such certificate or interim operating authority had not been revoked or otherwise terminated by the Board or had not otherwise expired prior to the enactment of this Act: Provided, That for the purposes of this section such certificate or operating authority shall be considered to have been revoked or terminated if the Board has issued a final order to that effect on or before the date of enactment of this Act, notwithstanding a pending judicial review of such order; and

(4) that such certificate or interim operating authority is held by the original grantee or has been transferred to the applicant with Board approval pursuant to section 401(h) of the Federal Aviation Act of 1958: *Provided*, That a person who on the date of enactment of this Act had on file with the Board an application for the approval of tranfer to him of a certificate for supplemental air transportation or interim operating authority, may be issued a new interim certificate or new interim operating authority under this section if the Board approves the transfer pursuant to section 401(h) of the Federal Aviation Act of 1958;

the Board may issue a new interim certificate or new interim authority to such applicant to engage in supplemental air transportation, as defined in the Federal Aviation Act of 1958, subject to such terms, conditions, and limitations as the Board may prescribe, pending issuance or denial of a certificate pursuant to section 401(d)(3) of the Federal Aviation Act of 1958 if it determines that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of such Act and the rules, regulations, and requirements of the Board and the Administrator.

APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 6470

WORLD AIRWAYS, INC.,
DEFENDANT, APPELLANT,

v.

NORTHEAST AIRLINES, INC.,
PLAINTIFF, APPELLEE;

No. 6471

NATIONWIDE CHARTERS AND CONVENTIONS, INC., ET AL.,
DEFENDANTS, APPELLANTS,

v.

NORTHEAST AIRLINES, INC.,
PLAINTIFF, APPELLEE.

Before ALDRICH, *Chief Judge*, BREITENSTEIN,* *Circuit Judge*, and GIGNOUX, *District Judge*.

OPINION OF THE COURT
August 30, 1965

BREITENSTEIN, *Circuit Judge*. These consolidated appeals attack temporary and permanent injunctions issued by the district court on the complaint of the plain-

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* By designation.

tiff-appellee Northeast Airlines, Inc., (Northeast) restraining defendants-appellants World Airways, Inc., (World), Nationwide Charters and Conventions, Inc., (Nationwide), and Harold Low, the president and sole stockholder of Nationwide, from engaging in certain activities which the district court held to be in violation of the certificate of authority issued by the Civil Aeronautics Board (CAB) to World.

Northeast holds temporary authority from CAB to provide scheduled air transportation in the so-called East Coast-Florida air travel market.[1] World is a certificated supplemental air carrier authorized by CAB to engage in charter trips. Nationwide is a travel agency which, in addition to the ordinary activities of such an agency, promotes and arranges travel by charter groups.

In the certificate of authority issued by CAB to World "charter trips" are defined thus:

> "* * * air transportation * * * where the entire capacity of one or more aircraft has been engaged on a time, mileage, or trip basis:
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> * * * *
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> (b) By a person (no part of whose business is the formation of groups or the consolidation of shipments for transportation or the solicitation or sale of transportation services) for the

[1] CAB by order E-19910, August 15, 1963, denied Northeast's application for renewal of its temporary certificate. This court set aside that order and remanded the case for further proceedings. *Northeast Airlines, Inc.* v. *Civil Aeronautics Board*, 1 Cir., 331 F.2d 579. After remand, CAB again denied renewal. Order E-21550, New York-Florida renewal case. On April 13, 1965, this court remanded a second time for further proceedings. *Northeast Airlines, Inc.* v. *Civil Aeronautics Board*, 1 Cir., F.2d . CAB, on April 26, 1965, announced that it was reopening the proceedings to consider the issues afresh in the light of the most recent data. On May 11, 1965, this court approved the CAB order and relinquished jurisdiction. On May 19, 1965, it denied motions to stay the May 11 order. There the matter stands.

> transportation of a group of persons and/or their property, as agent or representative of such group;
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> * * * *
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> and where such air transportation does not include services (i) offered by or on behalf of the holder hereof [World] for the carriage of individual members of the general public who are formed into or joined with any group with the direct or indirect assistance or participation of the holder hereof, or (ii) performed under an arrangement with a person * * * who provides or offers to provide transportation to the general public, * * *."

On August 13, 1964, World and Nationwide entered into an arrangement called a "Sales Agency Agreement." World made Nationwide its agent to sell the "capability" of a certain aircraft for 262 flights over the period December, 1964, to May, 1965.[2] Nationwide agreed "to sell a sufficient number of aircraft charter agreements to Bona Fide Charter Groups" to utilize the aircraft capability on the listed flights except for 44 permissibly cancellable flights. Nationwide was required to make a cash deposit to assure performance and payment, to pay certain "Administrative Costs," and to pay certain liquidated damages in the event of impermissible flight cancellations. The contract spelled out in some detail the control of World over the execution of charter agreements, representations concerning the flights, solicitations, and advertising. The trial court held the August 13 document to be "a contract on the part of World to provide its aircraft to Nationwide, a part of whose business is the formation of groups for air transportation" which violated the definition of "charter trips" in the World certificate, and entered summary judgment for Northeast.

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[2] The flights were from Boston, New York, and Philadelphia to Miami and from New York to Honolulu, with return flights from each destination city.

In separate motions to dismiss the complaint the appellants attacked the jurisdiction of the court. They first say that Northeast is not a "party in interest" within the meaning of 49 U.S.C. § 1487(a). That section confers jurisdiction on United States district courts in actions brought by CAB for violations of Chapter 20, Title 49, U.S.C.[3] and provides that "in the case of a violation of Section 1371(a) of this title, any party in interest may apply" to enforce obedience or restrain violations. Section 1371(a) prohibits an air carrier from engaging in any air transportation "unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

We have found no helpful judicial interpretation of §§ 1487(a) and 1371(a). *Civil Aeronautics Board* v. *Modern Air Transp., Inc.*, 2 Cir., 179 F.2d 622, was a suit by CAB and the question of the jurisdiction of the district court to entertain an injunction action on the suit of a private party was expressly reserved.[4] The meaning and the application of the statutes to the dispute are clear to us. Northeast, a scheduled carrier serving the East Coast-Florida points, is affected by charter operations covering about 200 flights between those points by a chartered aircraft carrying 180 passengers at a charter price of over $10,000 for each round trip.[5] The interest of Northeast in injunctive relief is enhanced by the fact that the World-Nationwide contract covered flights for the period December 19, 1964, to May 5, 1965. The time consuming enforcement procedures of CAB[6] followed by review in a court of appeals would have permitted com-

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[3] 49 U.S.C. §§ 1301-1542.

[4] 179 F.2d 622, 626.

[5] We shall discuss later the East Coast-Honolulu flights.

[6] See 14 C.F.R. Part 302.

pletion of the contract and left Northeast with the illusory remedy of damages.

The appellants do not appear to question seriously the interest of Northeast. Rather they argue that the courts have jurisdiction on the complaint of a private party only when the defendant is operating without any authority to fly the route in question; and they point out that World has a valid certificate. This argument overlooks the language of § 1371(a). The certificate must authorize the transportation in question. Here the issue is whether World is permitted to engage in the challenged charter flights. If the certificate does not authorize "such transportation," § 1371(a) is violated.

Nationwide and Low say that their motions to dismiss should be sustained because neither is an "air carrier" engaged in "air transportation" as those terms are defined in the statute.[7] Section 1487(a) permits suit against "any person" for violation of the act and authorizes an injunction against "such person, his officers, agents, employees and representatives." Although World may be the principal violator, those who participated with World may also be enjoined if the operations violated the act.[8] Northeast alleged, and the record shows, that Nationwide and Low acted as agents of World in connection with the flights in question.

We are convinced that Northeast has standing to maintain the action and that relief may be sought against all defendants-appellants. Northeast could also have proceeded before the Board. The appellants say that its failure to do so destroys the jurisdiction of the courts. Nothing in § 1487(a) requires the exhaustion of administrative remedies before the invocation of court action. The

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[7] See 49 U.S.C. § 1301(3) and (10).

[8] See *M & R Inv. Co.* v. *Civil Aeronautics Board*, 9 Cir., 308 F.2d 49, 51.

question is whether the doctrine of primary jurisdiction relegates Northeast to administrative proceedings in advance of resort to the courts.

Under the doctrine of primary jurisdiction [9] the courts will not determine a question within the jurisdiction of an administrative tribunal where the determination demands the exercise of administrative discretion requiring the special knowledge and experience of the administrative tribunal [10] or where court action will possibly interfere with or impair the coherence and uniformity of an intricate administrative program.[11] The rule is that the doctrine of primary jurisdiction is inapplicable "where the issues, regardless of its complexity, is not the reasonableness of the rate or rule, but a violation of such rate or rule." [12] Here we do not have any question of the reasonableness of the rule defining "charter trips" [13] which is incorporated in the World certificate but instead the question of whether there has been a violation thereof.

The appellants say that the grants of interim authority for charter trips to supplemental air carriers are parts of a pervasive regulatory scheme implementing the economic

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[9] In his discerning article on "Primary Jurisdiction" Prof. Louis L. Jaffe said (77 Harv.L.Rev. 1037): "The so-called doctrine of primary jurisdiction cannot be stated in the form of a rule in terms either of its analytic structure or of its incidence. It may be seen as an attempt to resolve the procedural and substantive conflicts inevitably created when there is carved out for an agency an area of original jurisdiction which impinges on the congeries of original jurisdictions of the courts."

[10] *Civil Aeronautics Board* v. *Modern Air Transp., Inc.*, 2 Cir., 179 F.2d 622, 624.

[11] See *Slick Airways, Inc.* v. *American Airlines, Inc.*, D.C.N.J., 107 F.Supp. 199, 206, appeal dismissed 204 F.2d 230, certiorari denied 346 U.S. 806.

[12] *Civil Aeronautics Board* v. *Modern Air Transp., Inc.*, 2 Cir., 179 F.2d 622, 624.

[13] See 14 C.F.R. § 207.1.

regulations of CAB and calling for administrative expertise when construction of a certificate is sought. They urge that we have here a case "raising issues of fact not within the conventional experience of judges * * * requiring the exercise of administrative discretion."[14] We see the case in a different light. The issue is whether the contract between World and Nationwide violates the certificate of authority issued to World. The language of the certificate is clear. The definition of "charter trips" excludes such trips when engaged by a person who is in the business of forming groups for transportation of the members thereof or in the business of soliciting or selling transportation services. The answer depends on whether the contract violates this exclusion and requires an analysis of the contract. The analysis, interpretation, construction, and application of contracts are within judicial competence and, at least in the case before us, require no administrative expertise for a solution.

No plan of regulation would be infringed by the exercise of court jurisdiction.[15] We are not concerned with the administrative process of creating a scheme of regulation. Rather we are concerned with a particular certificate of authority and a particular contract. The fact

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[14] See *Far East Conference* v. *United States*, 342 U.S. 570, 574.

[15] This is established by the memorandum which the general counsel of CAB filed in the district court. It said in part: "In light of the findings in paragraph 3 of the Court's memorandum of December 21, 1964, the Civil Aeronautics Board believes that it would be appropriate for the Court to issue an injunction against the unlawful conduct found to have been engaged in by the defendants, in such geographic areas in which the plaintiff is determined by the Court to be a "party in interest" entitled to protection against unauthorized operation. (See Section 1007 of the Federal Aviation Act, 49 U.S.C. 1487)." The memorandum concluded thus: "Apart from the above suggested language, the Board would consider that any decree which the Court might enter would not affect or impair the exercise of the Board's powers under the Federal Aviation Act." The court adopted the suggestions made in the memorandum.

that CAB may grant exemptions from the operation of the statute is immaterial. The record does not show that the appellants have sought an exemption or that an exemption proceeding is pending before CAB. The argument that CAB might grant an exemption in a proceeding before it has no bearing on uniformity of regulation, is at best speculative, and at worst sacrifices the judicial remedies "deliberately saved" by the statute beyond what is necessary to achieve the basic purpose of the doctrine of primary jurisdiction.[16]

This is not a case like *Trans-Pacific Airlines* v. *Hawaiian Airlines*, 9 Cir., 174 F.2d 63, where Hawaiian sought to enjoin Trans-Pacific from operating as a scheduled air carrier and it appeared that the Board had granted Trans-Pacific an exemption. The court held that as long as the exemption was effective Trans-Pacific was under the jurisdiction of the Board and the courts could not interfere. Here we have operation by World under a certificate rather than under an exemption.

We are convinced that the district court had jurisdiction. Other points raised by the motions to dismiss relate to the merits and do not require separate treatment.

On the merits the briefs and arguments of the parties tend to go far afield. Much is said about the solicitation of business by Nationwide through the various news media and about the basis of the per passenger charge for the charter flights. Appellants say that their activities were within the criteria established by CAB in its Docket No. 15005—*Eastern Air Lines, Inc.* v. *Trans International Airlines, Inc.*,—the so-called Shower of Stars case. Northeast denies this and points to a December 11, 1964, letter from the director of the CAB Bureau of Enforcement criticizing certain activities of World and two other holders of charter certificates. The appellants

[16] Jaffe, "Primary Jurisdiction," supra at 1055.

urge that these differences establish the existence of a good faith dispute over material facts which preclude the grant of a summary judgment. Consideration of these problems is unnecessary. Determination of the question of whether the World-Nationwide contract violates World's certificate is dispositive of the case. No dispute exists over the facts relating to either of these written documents. They present a question of law.

By the contract World made Nationwide its agent to sell the capability of one Boeing 707-373C aircraft configured to accommodate 180 passengers for charter operations in accordance with a schedule covering 262 flights. Nationwide agreed to deposit $50,000 with World to secure performance by Nationwide and to secure the payment of sums due for each charter trip. World agreed to pay Nationwide commissions according to a fixed table. Nationwide agreed to pay to World $116,000, as "Administrative Costs" in instalments and subject to specified credits. Nationwide could cancel 44 flights. If a required flight did not take place, Nationwide was obligated to pay fixed amounts as liquidated damages [17] subject to specified deductions bearing on mitigation of damages.

Under the certificate issued to World the term "charter trip" does not include transportation where the entire capacity of an aircraft has been engaged on a trip basis by a person, a part of whose business is the formation of groups for, or the solicitation or sale of, transportation services and where such transportation is performed under an arrangement with a person who provides or offers to provide transportation to the general public. Nationwide is a travel agency which, in addition to the ordinary

[17] The amounts ranged from $9,000 to $40,000. These may be compared with the charter rates which varied from $10,233 to $44,703.

activities of such an agency, promotes and arranges travel charter groups.[18] It could not have carried out its contract obligation of selling the capability of one of World's aircraft without soliciting[19] and selling transportation services. By the agreement World makes its agent for the sale and use of the charter flights an entity whose operations exclude it from the certificate definition of a permissible charterer.

This conclusion is unaffected by the provisions of the agreement that Nationwide was to provide charters only to bona fide groups, that an authorized representative of each group was to execute the formal charter, and that each group was to pay the charter price. The difficulty is that Nationwide, a travel agency serving the public, is obligated to pay fixed amounts as liquidated damages if any required flight is not sold. Its contract with World required the solicitation and sale of air transportation. The combination of the type of business in which Nationwide engages and of its obligation to pay in any event with the necessity for soliciting and selling transportation in order to perform makes the World-Nationwide agreement violative of the World certificate.

The points raised by the appellants in regard to the grant of the preliminary injunction merit no consideration. The order granting that injunction was merged in the decree for a permanent injunction.[20] We are satisfied that the showing of irreparable damage and inadequacy of other remedies is sufficient.

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[18] In its brief filed in this court Nationwide says that it "is a travel agency engaged in the business of promoting and arranging travel by charter groups, in addition to the ordinary activities of a travel agency."

[19] The fact of solicitation is shown by many advertisements which were made by Nationwide in East Coast newspapers and which are not questioned.

[20] See *Peterson* v. *Brotherhood of Locomotive Firemen*, 7 Cir., 268 F.2d 567, 568, and cases there cited.

Appellants say that the findings of the district court are insufficient to sustain the injunction. We disagree. Rule 52(a), F.R.Civ.P., permits findings to appear in an opinion or memorandum of decision. The district court's opinion sufficiently found the facts pertaining to World's certificate and to the contract between World and Nationwide. These sustain the conclusion that the contract was contrary to the terms of the certificate.

The form of the injunctive decree is bothersome. All that is necessary is to enjoin the operation and performance of the Sales Agency Agreement. The decree goes beyond this and enjoins individual features of the operation and performance of that agreement. When it does so, difficulty is encountered because the evidence is conflicting whether some of the specifically enjoined activities occurred and because the case was disposed of on an application for summary judgment. The court should enjoin the performance and operation of the unholy alliance between World and Nationwide—not specific acts which may or may not take place thereunder. If hereafter a dispute arises with respect to such specific acts, appropriate proceedings may be brought to determine whether they violate the decree.

Appellants complain of the injunction against charter flights to Hawaii and say that as to these Northeast is not a party in interest because its authority does not include flights from the East Coast to Hawaii. When this matter was before this court on the application for relief from the preliminary injunction, the court remanded the case to the district court for further consideration of this aspect of the injunction. Northeast says that the pricing of the Hawaii flights made them competitive with Florida flights and diverted traffic from Florida. We are unable to say whether this is correct because the record contains no pertinent findings by the trial court. To uphold its position Northeast must es-

tablish, and the court must find, facts establishing the interest of Northeast in the East Coast-Hawaii flights. Otherwise, Northeast is in no position to complain.

The judgment is affirmed insofar as it enjoins the operation and performance of the Sales Agency Agreement in connection with flights from the East Coast points to Florida. The case is remanded for findings with respect to the East-Coast Hawaii flights and for such modification of the judgment as may be called for to conform to the views expressed in this opinion. Costs to appellee.

Opinion of the District Court

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 64-879-S

NORTHEAST AIRLINES, INC.,
PLAINTIFF

v.

WORLD AIRWAYS, INC., NATIONWIDE CHARTERS AND CONVENTIONS, INC., AND HAROLD LOW, DEFENDANTS

OPINION
March 12, 1965

SWEENEY, CH. J. There is now before me a motion for summary judgment against all defendants, this motion being supported by affidavits and exhibits. All defendants have filed counteraffidavits and exhibits. The effect of summary judgment, if allowed, will be to make the temporary injunction issued by this court on December 21, 1964 permanent. An appeal from that preliminary injunction is now pending before the Court of Appeals for this Circuit.

In its motion the plaintiff alleges ten violations by World of its interim certificate. Some of these, standing alone, might not warrant the harsh effect of an injunction. Some, also, are contested factually and, therefore, ought not to be considered in an application for summary judgment. The court is of the opinion that it can pass upon and grant the motion for summary judgment, basing its decision on the illegality of the plan of operation disclosed in the contract between World and Nationwide and in its operation.

Opinion of the District Court

The defendants contend that the complaint does not state a claim upon which relief can be granted and that the court has no jurisdiction over the matter involved. Both of these contentions are without merit and overruled. 49 U.S.C.A. § 1487 specifically confers jurisdiction on this court to enforce by injunction or otherwise compliance with section 1371(a) which deals with the certificate of public convenience and necessity issued to World and other airlines.

Findings of Fact

The defendant Low is the sole stockholder of Nationwide and conducted all negotiations in behalf of Nationwide with World. In its Memorandum of December 21, in passing upon the necessity of an injunction *pendente lite* the court concerned itself with the activities of Nationwide as agent for World as the contract between the defendants was designated as a "Sales Agency Agreement." At that time the court found that the activities of Nationwide, as the so-called "agent" for World, constituted the conducting of individually-ticketed transportation under the guise of "charter trips." The evidence before the court established that the flights were not true charter flights and the injunction, therefore, issued, prohibiting flights that were not within the terms of World's certificate.

There is now before the court the agreement executed in August 1964 between World and Nationwide. While it is designated as a "Sales Agency Agreement," it is, in fact, a contract for hire which under the terms of World's certificate is illegal. The defendants contend that their activities are authorized by decision of the Civil Aeronautics Board in the *Shower of Stars* case, issued by the Bureau of Enforcement on July 1, 1964 and affirmed by the Board on October 23, 1964. A copy of that opinion is attached to the defendants' brief. After the *Shower of*

Stars decision was made public, the defendants devised their present plan of operations, using it as a springboard from which they might conduct regularly scheduled trips between Boston, New York and Miami and Hawaii during the period when traffic was heaviest. In setting up their plan, they did not confine it to the permissible facts developed in that case but went beyond the scope of the decision to an extent that drew from the Bureau of Enforcement of the Board a letter dated December 11, 1964, calling World's attention to the fact that "some of the recent activities in the domestic charter field are beyond the scope of the *Show of Stars* and raise new questions." That letter did not directly charge World with being one of those in the domestic charter field who had gone beyond the scope of the decision, but it is noteworthy that as a result of the receipt of that letter World cancelled certain flights and caused Nationwide to eliminote certain then objectionable advertising. The *Shower of Stars* decision is somewhat helpful in deciding this case but in and of itself is not controlling.

An examination of World's interim certificate discloses, however, that Part I authorized it to conduct charter trips. Part V (1) of the same certificate defines charter trips as meaning ". . . air transportation . . . where the entire capacity of one or more aircraft has been engaged . . .

> "(b) By a person (no part of whose business is the formation of groups or the consolidation of shipments for transportation or the solicitation or sale of transportation services) for the transportation of a group of persons and/or their property, as agent or representative of such group; . . .

and where such air transportation does not include services (i) offered by or on behalf of the holder hereof for the carriage of individual members of the general public who are formed into or joined with any group with the direct or indirect assistance or participation of the holder

hereof, or (ii) performed under an arrangement with a person . . . who provides or offers to provide transportation to the general public, . . ." Perhaps under the authority of its charter, World directly might have engaged in local advertising for the formation of charter-worthy groups; and if it could do so, it could probably authorize an agent to do it in its behalf. But section (b) is in the nature of a prohibition against engaging as its agent one who is engaged in part in the formation of groups for transportation. I find and rule that Low and Nationwide come within the terms of that proviso.

Stripped of its legal verbiage, the so-called Agency Agreement" is a contract on the part of World to provide its aircraft to Nationwide, a part of whose business is the formation of groups for air transportation. Nationwide, on its part, agrees to pay for such aircraft. World agrees to provide and Nationwide agrees to pay for 262 flights out of Boston, New York, Philadelphia, only 44 of which could be permissively cancelled by Nationwide. The contract was written all in favor of World; although it specified that Nationwide was to charter its planes only to bona fide groups, it, nevertheless, looked to Nationwide to guarantee payment for each flight scheduled in the exhibits attached to its contract. Whether a flight was composed of a bona fide group or not, and without regard to the number of passengers aboard the plane and even if, in fact, there were no passengers and, hence, no flight, Nationwide was bound to pay the contract price for the plane subject to certain allowances.

On its part, Nationwide established a fixed price for each packaged tour, based upon what it had contracted to pay to World plus what it had contracted to pay hotels and others in order to make up the package. This figuring must have been done on the basis of an anticipated certain number of passengers. If there were more than the base number, Nationwide was the beneficiary; if

there were less than the base number, Nationwide was the loser. The letter of December 11 pointed out that true charter flights must be based upon a pro rata cost to the passengers of the plane. It further pointed out that there could be no sliding up and down of the land costs so as to avoid refunds to its passengers in order for the flights to be proper pro rata charters. It stated, "the portion of the total cost of the package attributable to air transportation must be clearly ascertainable by dividing the air carrier's charter price by the number of passengers."

Conclusions of Law

On the basis of the above, I find and rule that the flights scheduled between the defendant World Airways, Inc. and the defendant Nationwide Charters and Conventions, Inc. under the so-called "Sales Agency Agreement" are in violation of "Part I — Charter Service" as defined by Part V of its interim certificate and are illegal; and the defendant World is liable to plaintiff Northeast Airlines, Inc. for damages, if any, suffered by it.

I find and rule that Nationwide Charters and Conventions, Inc. and Harold Low, individually, cooperated fully with World in the illegal venture and are equally liable to plaintiff Northeast for such damages as it may have suffered.

On the motion for summary judgment, judgment is to be entered for the plaintiff and the temporary injunction is now made permanent under the same bond and terms provided in the temporary injunction. The case is retained by this court for the assessment of damages.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 6470

WORLD AIRWAYS, INC.,
DEFENDANT, APPELLANT,

v.

NORTHEAST AIRLINES, INC.,
PLAINTIFF, APPELLEE;

No. 6471

NATIONWIDE CHARTERS AND CONVICTIONS, INC., ET AL.,
DEFENDANTS, APPELLANTS,

v.

NORTHEAST AIRLINES, INC.,
PLAINTIFF, APPELLEE.

Before ALDRICH, *Chief Judge*, BREITENSTEIN,* *Circuit Judge*, and GIGNOUX, *District Judge*.

JUDGMENT

August 30, 1965

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

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* By designation.

Judgment of the Court of Appeals

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed insofar as it enjoins the operation and performance of the Sales Agency Agreement in connection with flights from the East Coast points to Florida; and the cause is remanded for findings with respect to the East Coast-Hawaii flights and for such modification of the judgment as may be called for to conform to the views expressed in the opinion filed this day. Costs to appellee.

By the Court:

/s/ Roger A. Stinchfield,
Clerk.

Enter:
/s/ Aldrich, Ch. J.

Judgment of the District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 64-879-S

NORTHEAST AIRLINES, INC.,
PLAINTIFF

v.

WORLD AIRWAYS, INC.,
NATIONWIDE CHARTERS AND CONVENTIONS, INC.,
AND
HAROLD LOW,
DEFENDANTS

JUDGMENT

March 16, 1965

SWEENEY, CH. J. After hearing on Plaintiff's motion for Summary Judgment and in accordance with the opinion of the Court handed down this day, it is hereby

ORDERED:

Judgment for the Plaintiff for a permanent Injunction permanently enjoining

A. Nationwide Charters and Conventions, Inc., and Harold Low, and each of them, and the agents and servants of each of them, from:

1. soliciting passengers or accepting any reservations for any charter flight between Boston, New York, Philadelphia and Washington on the one hand, and Florida and the Hawaiian Islands on the other hand (a) from any member of the general public, (b) from any person before

the execution of a charter agreement for the flight by a person duly authorized to do so, or (c) after the execution of such an agreement, from any person who was not, at the time of execution thereof, a member of the group on whose behalf said agreement has been executed;

2. soliciting passengers for any charter flight between the aforesaid points as agent for, or with the direct or indirect assistance or participation of, any air carrier;

3. engaging any charter trips between the aforesaid points directly or indirectly by guaranteeing a minimum number of passengers or otherwise;

4. soliciting, or accepting any reservations for, any charter flight between the aforesaid points unless the payment therefor by the persons engaging said flight cannot, in the aggregate, exceed the carrier's duly published charter rate;

5. having any arrangement whatsoever, of any kind or character, directly or indirectly, with any air carrier in connection with the performance of any charter flight between the aforesaid points while providing, or offering to provide, transportation to the general public;

6. inducing, persuading or causing any air carrier to operate charter flights between the aforesaid points exclusively as part of any package tour sponsored or promoted by them, or either of them;

7. soliciting passengers for scheduled air transportation for groups between the aforesaid points; and

8. making any payment to any organization sponsoring any charter flight between the aforesaid points.

B. World Airways, Inc., and its agents and servants, and each of them, from:

1. operating any charter flight between Boston, New York, Philadelphia and Washington on the one hand, and Florida and the Hawaiian Islands on the other hand, carrying any passenger which was solicited therefor prior to the execution of a charter agreement therefor by a person duly authorized to do so, or carrying any passenger who was not, at the time of the execution of the charter agreement therefor, a member of the group on whose behalf the charter agreement was executed;

2. directly or indirectly assisting or participating in the formation of a group or the solicitation of passengers for any charter flight between the aforesaid points, or operating any charter flight between the aforesaid points where it has so assisted or participated;

3. operating any charter flight between the aforesaid points engaged by a person part of whose business is the formation of groups for transportation or the solicitations or sale of transportation services;

4. operating any charter flight between the aforesaid points unless the payment therefor by the persons engaging said flight cannot, in the aggregate, exceed its duly published charter rate;

5. operating any charter flight between the aforesaid points under an arrangement with a person who provides or offers to provide transportation to the general public;

6. operating any charter flight between the aforesaid points exclusively as part of a package tour sponsored or promoted by any person or persons engaged in whole or in part in the forma-

tion of groups for travel or the solicitation or sale of transportation services, or otherwise unreasonably limiting the availability of its equipment for charter flights between the aforesaid points, or unjustly discriminating against, or unduly preferring, any person or persons in operating charter trips;

7. engaging in scheduled air transportation for groups between the aforesaid points; and

8. engaging in charter air transportation between the aforesaid points which is not authorized by, or is in violation of, its certificate of public convenience and necessity; and it is further ORDERED

That the Court retain jurisdiction of this cause for the purpose of assessing damages.

By the Court,

Deputy Clerk

March 16, 1965

Chief Judge, U. S. District Court

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 774

WORLD AIRWAYS, INC.,
PETITIONER,

v.

NORTHEAST AIRLINES, INC.,
RESPONDENT.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The First Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Northeast Airlines, Inc. respondent herein, respectfully submits the following in opposition to the Petition for a Writ of Certiorari filed November 26, 1965:

Question Presented

The sole question presented by the petition herein is whether the District Court properly exercised its jurisdiction under section 1007(a) of the Federal Aviation Act of 1959 ("the Act"), 49 U.S.C. § 1487(a), to enjoin illegal

air transportation instead of remitting the matter to the Civil Aeronautics Board ("the Board"), where the substantive issue was a matter of interpretation within the conventional experience of courts, the Board had supported the exercise of jurisdiction, and the court had the benefit of a decision in the matter of the Board's agency charged, by delegation of authority, with responsibility for enforcing the provisions of the Act?

Statement

At the outset of the winter of 1964-65, Northeast Airlines, one of three airlines authorized to provide air transportation in the so-called East Coast-Florida air travel market, was faced with the prospect of substantial competition for the highly seasonal air travel business to Florida from not only Eastern Air Lines and National Airlines, the two other scheduled air carriers, but also from petitioner and other supplemental air carriers authorized to provide only so-called charter service. Petitioner alone had scheduled twelve flights every weekend during the season as compared with sixteen such flights by Northeast.[1]

After investigation Northeast became convinced that petitioner's flights were not authorized by, and were in violation of, the terms of its certificate, in which the key term "charter trips" is defined as

> "air transportation . . . where the entire capacity, of one or more aircraft has been engaged on a time, mileage, or trip basis: . . . By a person (no part of

[1] R. 387-388; Official Airline Guide, December, 1964. The Petition for a Writ of Certiorari and the Appendices thereto are cited herein, respectively, as Pet. and Pet. App. Certain materials which are not reproduced in any appendix to the Petition are cited herein by reference to the printed Record ("R.") which was before the court below and is part of the certified record filed in this Court.

whose business is the formation of groups . . . for transportation or the solicitation or sale of transportation services) for the transportation of a group of persons and/or their property, as agent or representative of such group . . . ." (R. 259).

In view of Northeast's dire financial situation and the need, in order to obtain permanent certification to Florida, to convince the Board that the market was large enough to require its services on a permanent basis—a position the Board had previously rejected[2] — it became imperative that these violations be curbed promptly. Inasmuch as the Board has no power to grant preliminary relief, the only possible way of doing so was by commencing an action in the District Court under section 1007(a) of the Act, which Northeast did on December 11, 1964. The complaint prayed, *inter alia*, for preliminary and permanent injunctions restraining petitioner from performing certain charter flights which were alleged to be in violation of petitioner's certificate. (R. 12-17).

Prior to the date Northeast instituted this action, the Board's Bureau of Enforcement, to which the Board has delegated the responsibility for enforcing the provisions of the Act,[3] conducted its own investigation of the charter arrangements of petitioner and other supplemental air carriers, and by letter dated December 11, 1964,— the date the present action was commenced — John G. Adams,

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[2] The full story of Northeast's efforts to obtain permanent certification from the Board in the East Coast-Florida market is set forth in *Northeast Airlines, Inc.* v. *Civil Aeronautics Board*, 331 F.2d 579 (1st Cir. 1964); *Northeast Airlines, Inc.* v. *Civil Aeronautics Board*, 345 F.2d 484 (1st Cir. 1965); *Northeast Airlines, Inc.* v. *Civil Aeronautics Board*, 345 F.2d 488 (1st Cir. 1965), *cert. denied sub nom. Eastern Air Lines, Inc.* v. *Northeast Airlines, Inc.*, 15 L. Ed. 2d 85 (1965).

[3] Public Notice PN-15—Statement of Organization and Delegations of Final Authority, 26 Fed. Reg. 7231 (Aug. 10, 1961).

then Director of the Bureau of Enforcement and now a member of the Board, advised petitioner and other supplemental carriers that certain practices of which Northeast had complained were in violation of their certificates, including arrangements by which a travel agent gives to the carrier express or implied guarantees as to the amount of revenue to be realized by the carrier from a charter trip. (R. 34-41).

Thereafter, on December 19, 1964, Northeast filed a motion for a preliminary injunction, and on December 21, 1964, the District Court indicated it would grant the injunction requested. (R. 295). The Civil Aeronautics Board then filed a memorandum in the District Court in which it endorsed and supported Northeast's motion for preliminary injunction and restated its view of long standing that the doctrine of primary jurisdiction was inapplicable and that action by the court would not impair the exercise of the Board's statutory powers. (R. 295-297). Thereafter the court on December 24, 1964, issued the preliminary injunction. (R. 298-301).

On January 26, 1965, Northeast filed a motion for summary judgment based solely upon a so-called "Sales Agency Agreement" between petitioner and Nationwide Charters and Conventions, Inc. ("Nationwide"), a travel agent. (R. 306).

The so-called "Sales Agency Agreement" (R. 371-388) between petitioner and Nationwide was entered into on August 13, 1964. By the agreement petitioner committed aircraft to Nationwide, and Nationwide undertook to sell some 262 charter flights, of which 218 flights were not cancellable. For each non-cancellable flight which Nationwide was unable to sell to a qualified charter group, Nationwide was obliged to pay petitioner as liquidated damages a fixed amount which equalled petitioner's tariff rate less agency commission. Nationwide also agreed to deposit

$50,000 to secure performance by it and to secure the payment of sums due for each charter trip.

After hearing, Northeast's motion for summary judgment was allowed on March 12, 1965. (R. 424-428). On March 16, 1965, the District Court entered the judgment for a permanent injunction substantially similar in its terms to the preliminary injunction. In so doing, the District Court found that flights under the agreement violated petitioner's certificate, that the court had jurisdiction of the cause by virtue of 49 U.S.C. § 1487(a), and that further resort to the Board was not required.

The Court of Appeals for the First Circuit affirmed the judgment insofar as it enjoined the operation of flights between Boston/New York/Washington/Philadelphia and Florida pursuant to the "Sales Agency Agreement". The Court of Appeals also held that the District Court had jurisdiction under 49 U.S.C. § 1487(a), and that further resort to the Board was not required.

Argument

The present petition does not present any question of general importance warranting the attention of this Court. In the first place, the real issue raised by petitioner's arguments is the very limited question whether administrative expertise was required to resolve the narrow substantive issue raised by this particular case—the issue whether, in law, under the Sales Agency Agreement Nationwide was the party which had "engaged" the aircraft of petitioner. Second, this case does not involve the usual general problem of primary jurisdiction, which is concerned with accommodating the general jurisdiction of courts with jurisdiction of regulatory agencies, but involves the much narrower issue of the exercise of jurisdiction by a court under a special limited jurisdictional statute, 49

U.S.C. § 1487(a), which is itself part of the regulatory scheme. Third, few cases have arisen under 49 U.S.C. § 1487(a) and its predecessor section of the Civil Aeronautics Act of 1938, and the issue of primary jurisdiction under this statute has thus been of no moment. Fourth, the decision in this case rests on the circumstances peculiar to this case that the substantive issue was a matter of documentary interpretation within the conventional experience of courts and that the Board had supported the exercise of jurisdiction by the court, and the court had the benefit of a decision on the substantive question by the Board's Bureau of Enforcement. Fifth, the decision by the courts below to exercise jurisdiction was required by the language and purpose of section 1007(a) and was in accordance with well-established principles permitting judicial decision without prior resort to the agency when the issue involved is violation of a rule rather than the reasonableness of a rule. Finally, the underlying dispute regarding the charter program under the "Sales Agency Agreement" is of no continuing practical significance because the agreement expired by its terms more than seven months ago and the Board has since prohibited the mass media advertising on which the effectiveness of such a charter program depends.

I. The Petition Raises No Significant Question of General Importance.

The petition manifestly raises no question of general importance warranting the attention of this Court, but raises only the narrow issue whether the court below should have applied primary jurisdiction to the unique facts of this case. Petitioner's principal argument for review by this Court is that prior resort to agency expertise was required in this case because the record showed

various actions by the Board indicating "concern" with certain aspects (not related to the issue in this case) of the definition of "charter trip" and because "a determination of the true significance" of a particular provision of petitioner's contract with Nationwide required "specialized knowledge" (Pet. 6-8). Petitioner itself points out that the court below felt that further agency expertise was not required because "the analysis, interpretation, construction and application of contracts are within judicial competence . . . , *at least in the case before us* . . . ." [Emphasis added]. (Pet. 4). The narrowness of the issue and its dependence upon the unique facts here could hardly be plainer, and the case comes down to a difference between the Board and the courts below on the one hand, and petitioner on the other, as to whether administrative expertise was required.

Furthermore, the petition does not raise the usual general question of primary jurisdiction but only a question of application to the special facts of this case of section 1007(a) of the Federal Aviation Act, 49 U.S.C. § 1487(a), a special section conferring on the district courts jurisdiction which is an integral part of the regulatory scheme. Section 1007(a) of the Federal Aviation Act specifically confers upon the federal district courts jurisdiction to enforce, among other things, compliance with section 401(a) of the Act, 49 U.S.C. § 1371(a), at the behest of either the Board or "any party in interest", which Northeast concededly is. The purpose of this provision is, as the Board pointed out in its memorandum to the district court, "to afford methods of enforcement *in addition to those provided by the Board* and in recognition of the fact that the Board's resources may not be adequate." [Emphasis added.] (R. 296) The standard primary jurisdiction case, such as *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59 (1956) or *United States* v. *Chesapeake and Ohio Ry. Co.*, 352 U.S. 77

(1956), involves consideration of the competence of a court under its grant of general jurisdiction to handle a common-law claim which is outside the regulatory framework but which involves a regulatory issue which is within the sphere of expertise of the administrative agency. This case involves the question whether the district court here properly exercised its express statutory jurisdiction under section 1007(a) of the regulatory act in considering Northeast's claim of violation of section 401(a) of the Act. This is not, then, a general primary jurisdiction case of accommodating judicial and administrative jurisdiction created under different, unrelated statutes; it is a peculiar case of jurisdiction by a court under a special jurisdictional provision of the particular regulatory statute. Therefore, the case has no important bearing upon questions of primary jurisdiction which arise under general jurisdictional statutes. For this reason alone, it is not one of general importance warranting the attention of this Court.

Moreover, section 1007(a) has been in the Federal Aviation Act and its predecessor, the Civil Aeronautics Act of 1938, for 27 years and in that time has been the subject of a mere trickle of litigation. The petition cites only one case other than the present which involved this statute —the 16-year-old case of *Trans-Pacific Airlines* v. *Hawaiian Airlines*, 174 F.2d 63 (9th Cir. 1949). The problem has arisen in few other cases, and it is clear that the narrow question of interpretation of section 1007(a) raised by the petition has not been a problem of moment.

In addition to involving a rarely-litigated special provision of the Federal Aviation Act, this case involved a confluence of circumstances peculiar to this litigation. First, the Board had, in its memorandum to the district court, expressly supported the exercise of jurisdiction by the court in this case and stated that any decision by the court here "would not affect or impair the exercise of

the Board's powers under the Federal Aviation Act." (R. 297). Second, the district court had the benefit of a decision by the Board's Bureau of Enforcement supporting the interpretation of petitioner's certificate on which Northeast's motion for summary judgment was premised—an interpretation which petitioner never contested administratively (R. 34-41); and finally, the issue on the merits involved the very narrow question of construction of the meaning of the word "engaged" in petitioner's certificate as it related to the legal effect of the so-called "Sales Agency Agreement"—a matter of documentary interpretation which was clearly a matter of law within the conventional experience and competence of courts.

Petitioner's claim of a conflict "in principal [sic]" between the decision below and the decision in the *Trans-Pacific* case, *supra*, is without substance. The courts in both cases recognized that certain problems require resort to agency expertise and others do not. The court in *Trans-Pacific* felt that the facts in that particular case did call for agency expertise; the court in this case felt that the facts here did not call for agency expertise. There is nothing in the *Trans-Pacific* opinion to indicate that the problem before the court there was at all comparable to the simple matter of documentary interpretation involved in this case. There is no real "conflict" between the two cases. The two courts simply reached different results on the facts before them as to whether administrative expertise was required.

II. In Any Event, the Decision Below Was Clearly Correct.

The decision below was clearly correct with respect to both the jurisdictional question and the merits. Section 1007(a) of the Act, 49 U.S.C. § 1487(a), provides that:

> "If any person violates any provision of this Act . . . or any term, condition, or limitation of any certificate . . . issued under this Act, the [Civil Aeronautics] Board . . . [its] duty authorized agents, or in the case of a violation of section 401(a) of this Act, any party in interest, may apply to the district court of the United States . . . for the enforcement of such provision of this Act, or of such . . . term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process . . ."

Section 401(a) of the Act, 49 U.S.C. § 1371(a), provides that:

> "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

Northeast's claim in this case was that petitioner holds under section 401(a) of the Act a certificate as a supplemental air carrier which permits it to transport passengers only by "charter trips" which are defined by the certificate in very specific terms, and that petitioner, by performing flights engaged pursuant to the agreement with Nationwide, had flagrantly violated the terms of the charter-trip restriction of its certificate, thereby engaging in air transportation which was not authorized by such certificate.

The language of section 1007(a) clearly gives the district courts jurisdiction over such a claim and says nothing about resort to Board processes prior to exercise of jurisdiction by the court although section 1007(a) is part of the same statute which creates the Board and defines its jurisdiction. That such prior resort could not have been intended is manifest from section 1006(a) of the Act,

49 U.S.C. § 1486(a), which lodges exclusive jurisdiction over any appeal from Board proceedings in the Courts of Appeals. Thus, if resort to Board processes were required prior to the exercise of jurisdiction by the district court under section 1007(a), such jurisdiction—and the provision itself—would be nullified by the exclusive jurisdiction of a Court of Appeals over appeal from the Board proceeding.

That prior resort to the Board under section 1007(a) could not have been intended is also clear from the purpose of the provision. In supporting the exercise of jurisdiction by the district court in this case, the Board emphasized that "the very purpose of the Section 1007 provision permitting a private party to obtain an injunction against a violation of operating authority is to afford methods of enforcement *in addition to those provided by the Board* and in recognition of the fact that the Board's resources may not be adequate." [Emphasis added]. (R. 296).

Thus, if prior resort to Board proceedings were required under section 1007(a), a private party would have no *additional* remedy against a violation of operating authority but merely the same Board remedies made available elsewhere in the Act, thus nullifying any possible purpose of section 1007(a).

This very case is the prototype of that for which the Board's resources were wholly inadequate. The cumbersome, time-consuming enforcement procedures of the Board and its inability to give preliminary relief or money damages would certainly have enabled petitioner and Nationwide to effectuate their illegal scheme for the 1964-65 winter season to the substantial and irreparable injury of Northeast. In a case such as this, the Board's administrative procedure would be: Northeast would file a complaint; the Bureau of Enforcement would investigate the complaint and determine, in the exercise of discretion,

whether or not to institute enforcement proceedings; if none were instituted, Northeast could appeal successively to the Board and to an appellate court, as was done in *Northeast Airlines, Inc.* v. *Civil Aeronautics Board,* D. C. Cir. Dkt. No. 18,511; if enforcement proceedings were instituted, then after notice, a hearing and a Hearing Examiner's decision, the Board could for the first time order the cessation of the illegal activities. By that time, of course, the 1964-65 winter season would have been over, and Northeast could not have had any relief whatsoever against performance of an illegal contract which by its terms expired on May 4, 1965 (R. 388).

The courts and the Board have consistently recognized that the exercise by the courts of jurisdiction under section 1007(a) without prior resort to the Board does not, in the words of the Board in this case, "affect or impair the exercise of the Board's powers under the Federal Aviation Act." (R. 297). See *Civil Aeronautics Board* v. *Modern Air Transport, Inc.,* 179 F.2d 622 (2d Cir. 1950); *Pacific Northern Airlines* v. *Alaska Airlines,* 80 F. Supp. 592 (D. Alaska 1948); *Alaska Air Transport Co.* v. *Alaska Airplane Charter Co.,* 72 F. Supp. 609 (D. Alaska 1947); *Flying Tiger Line* v. *Atchison, T. & S. F. Ry Co.,* 75 F. Supp. 188 (D. Cal. 1947). There is no such impairment because "the issue, regardless of its complexity, is not the reasonableness of the rate or rule, but a violation of such rate or rule." *Civil Aeronautics Board* v. *Modern Air Transport, Inc., supra* at 624, quoted in the decision of the First Circuit in this case at Pet. App. B-26. Thus, section 1007(a) properly leaves it to the Board to make the expert policy judgment as to the reasonableness of a certificate restriction but permits the courts to exercise their conventional function of determining violations of law by ascertaining the facts and measuring them against the terms of the legal restriction involved.

Such a task was particularly simple in this particular case, for the only fact before the court was the "Sales Agency Agreement" and the only issue was whether by such agreement Nationwide had "engaged" the capacity of petitioner's aircraft. The court had only to perform its conventional task of construing the agreement and measuring it against the clearly worded definition of "charter trip" in petitioner's certificate.

Petitioner's argument that the task of construing the contract required "specialized knowledge" of various specified matters is patently insubstantial and, indeed, is raised here for the first time. The record below is devoid of any evidence or argument regarding the legal significance of such empty jargon as "competing demands for jet capacity" or "'ferry' versus 'live' mileage". (Pet. 8). Even at this late stage petitioner simply states these hollow phrases without the slightest attempt to show what their legal significance might be.

Petitioner's further argument that a variety of circumstances showing "concern" by the Board with the definition of the term "charter trip" indicated that Northeast's claim was not within the competence of the court is manifestly specious. The matters set forth by petitioner as those with which the Board had been concerned, such as mass media advertising and the "Shower of Stars" case, which did not involve consideration of a "Sales Agency Agreement" such as was involved here, had nothing to do with the very narrow question of contract interpretation on which the decision of the court below was based. And the fact that the Board is considering the possible re-examination of the definition of "charter trips" in the certificates of the supplemental carriers is manifestly no basis for a court's refusing to exercise its clear jurisdiction under section 1007(a) to apply to facts before it the certificate provisions in effect at the time of suit. If the mere possibility of

amendment or modification of an air carrier's certificate by the Board—which is always present—were sufficient ground for ignoring the grant of jurisdiction in section 1007(a), the provision would be totally meaningless.

Furthermore, in this case there had been prior resort to the Board. The charges made by Northeast were set forth in detail before the Board's Bureau of Enforcement and that Bureau fully vindicated Northeast's position by the letter of December 11, 1964. Yet petitioner never took —as it might have[4]—a single step to contest further with the Board the Bureau's views. Petitioner was apparently more interested in arguing a theoretical primary jurisdiction in the courts than in obtaining a practical primary jurisdiction by the Board.

Thus the correctness of the court's decision rejecting applicability of primary jurisdiction to this case is supported by the language and purpose of section 1007(a), by the nature of the issue presented to the court for resolution, and by the fact that the views of the Board had been obtained and not contested by respondent.

On the merits also, the decision below was patently correct. The simple issue is whether the aircraft were "engaged" by Nationwide, a travel agent. If so, the agreement is illegal. The answer is equally simple. The aircraft were committed by petitioner to Nationwide for specific flights on specific days, and Nationwide was obligated to pay for each and every one of 218 non-cancellable flights at tariff rates less agency commission. Obviously, the aircraft were "engaged" by Nationwide.

This conclusion was supported by the Board's Bureau

[4] Petitioner might have sought from the Board a declaratory order that the agreement with Nationwide was legal or, alternatively, might have sought from the Board an exemption under section 416(b) of the Act, U.S.C. § 1386(b), covering flights under the agreement. For a case involving utilization of these procedures see *Northeast Airlines, Inc.* v. *Civil Aeronautics Board*, 345 F.2d 662 (1st Cir. 1965).

of Enforcement in its letter of December 11, 1964, in which the Bureau's director opined that

> "if express or implied guarantees as to . . . amounts of revenue are made by the agent . . . , it again appears that contrary to the strictures of . . . the interim certificates, . . . the agent is the true charterer." (R. 40).

Even petitioner advances no serious argument that the court's decision on the merits was erroneous. The most petitioner says is that the agency "might" have construed the contract differently. (Pet. 5).

III. The Underlying Dispute Is of No Continuing Significance.

The underlying dispute in this case — that over the legality of the World-Nationwide charter program — is of no continuing significance. The "Sales Agency Agreement" by its terms terminated May 4, 1965. (R. 388). It is highly unlikely that such a charter program will be renewed, regardless of the outcome of this litigation, in view of the fact that the Board has since adopted an order amending the interim certificates of petitioner and other supplemental air carriers to prohibit mass media advertising of charter trips, upon which such a charter program as that of World and Nationwide depends. (R. 414-422). This is the only pertinent amendment which the Board has made to petitioner's certificate since the present proceeding was initiated, and it is one which explicitly so restricts petitioner's charter authority as to eliminate as a practical matter any likelihood of a recurrence of this dispute over a charter program that expired by its own terms more than seven months ago. In these circumstances, the Board, if the matter were remitted to it, would certainly regard it

as moot and hypothetical, and review by this Court would, thus, serve no useful purpose related to this case.

Conclusion

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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